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SENATE JUDICIARY

EXHIBIT NO. 10

DATE 2/4/09

BILL NO. SB236

Dear Senator:

"If you have to ask what it costs, you can't afford it" is an unrealistic answer to a rational question. SB236, which would replace Montana's death penalty with a sentence of life without the possibility of parole, asks you to consider the cost of our death penalty system compared to a system without capital cases. What follows here is:

1. My comments on SB236's Fiscal Note plus my own efforts to find the answers to the bill's question (I taught for about 24 years in 3 of Montana's prisons).
2. Quotations from experts on the costs of having a death penalty.

Fiscal Note SB0236 2011 Biennium--comments/corrections/additions.

This Fiscal Note is a grab-bag of data. It does not give a full answer to the question: What does the death penalty system, exemplified by particular recent executions, cost? This question is difficult to answer completely, but studies in California, Florida, Texas, Georgia, Wisconsin, and North Carolina provide good answers--see quotes below. This Fiscal Note does not even mention costs to local and county governments; it does not mention the courts' costs. For example, it does not mention the mandatory state Supreme Court deliberation in all death penalty cases--see the Von Drehle quote below. The Fiscal Note does not consider the step-by-step requirements of the death penalty system from investigation and arrest through execution/exoneration. This Fiscal Note seems to rely on a very small sampling of cases, but it's unclear who, how many cases, over what time period. Unfortunately, the defense & prosecution costs, forensics, and expert witness costs are entirely missing.

Regarding "Description of fiscal impact", there is no doubt that death penalty cases DO (not 'may') take more time--see Eric Freeman, below. The impact to the office workload is NOT impossible to quantify, just difficult.

"Assumptions: Department of Corrections". #1 implies that death penalty cases are a very small part of the total prison population. This is true in the USA, as is the fact of decades usually spent on death row because of appeals and reviews. #2. DOC's cost estimate is probably close, but when I called Warden Mahoney's secretary, Cheryl Bolton, on 1 20 09, and asked for the protocol used in an execution, I got no answer. I'm not sure how extra precautions before, during, and just after an execution would be costed; I suspect that such events as Gov. Racicot's entourage visit to see Duncan McKenzie before his 1995 execution were not costed. #3. I hope the Senate will not take this remark as excuse to put the matter off for later years.

Office of the State Public Defender" #4. Whose case is this? How much has OPD paid

already? Over what time period? #5. How many attorney hours were paid over, say, the last 2 years? How many staff hours? #6. What is/was the cost of such a training course? Does the training need be periodically updated? Is anyone certified now? #7 means: OPD doesn't know. This is what experts mean--see Costanzo below--by the ongoing system costs, whether used or not. It's the essence of bureaucracy.

"Department of Justice" #8 The greatest costs accrue in the courtrooms and in preparation for court action. Notice that the courts' costs are not even mentioned. Judge Kozinske's estimate--see quote--is 10 times more staff time than other cases.

"Long-Term Impacts" #1. Again, who, over what time period, is this data based on? #2 & #4 Convicts' health is markedly poorer than that of the general citizenry. Based on prison infirmary costs, my own 25 years of observing them, and their own stories about their addicted parents, rough upbringing, their own use of glue, alcohol, drugs at an early age, and their risky behaviors--AIDS, Hepatitis C, violent fighting, etc., I don't think the average 75 is reliable. #5. DOC has specific figures for daily cost of incarceration at each prison, and even figures for each housing unit within Montana State Prison. Note: This Fiscal Note fails to recognize that eliminating the death penalty in favor of life without possibility of parole would mean eliminating the execution trailer and all the equipment, protocol, and training needed to carry out an execution. It could also mean that an inmate could move into regular prison population which would probably cost less than death row and could make it possible for the inmate to work and begin to pay some kind of restitution.

Summary: Please do not unquestioningly accept this Fiscal Note as the last word on what the death penalty forces the criminal justice system to spend. Read the quotations I provided to gain a fuller understanding of what such a system costs.

My sincere thanks for your attention and work,

Bob Filipovich

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Dear Senator

SB236, which replaces the death penalty with a sentence of life without the possibility of parole, hinges partly on the cost. How much more does a death penalty case cost than a non-capital case? What does it cost to maintain a system designed to respond to these rare cases? Who pays for what?

The following quotations from experts, reporters, participants provide answers that the Fiscal Note to SB236 does not provide. Compare them and you will gain a deeper understanding of the reasons to support SB236.

"In 1989, the Sacramento Bee reported that {California} could save \$90 million a year by abolishing the death penalty...It costs the state \$24,600 a year to house a prisoner in San Quentin, according to the state's Department of Corrections....According to a February 1992 article in the Sacramento Bee, an appeal should take between 815 and 1830 {attorney} hours per case." Don Babwin, reporter; in 'The Death Penalty' Harvey R. Mitchell, ed. (2001) p. 149.

"It costs much more to put a prisoner to death than to keep a prisoner in jail. In 1995 the Economist magazine cited several studies pointing to the higher cost of execution. One study indicated that the cost of trying, convicting, and sentencing...plus keeping him on death row for 8 years is \$2-\$3 million, which is the same amount it costs to keep three prisoners in a maximum security prison for forty years." Robert V. Wolf; 'Capital Punishment' (1997) p.65

"Contrary to popular intuition, a system with a death penalty is vastly more expensive than one where the maximum penalty is keeping murderers in for life. A 1982 New York study estimated the death penalty cost conservatively at three times that of life imprisonment, the ratio that Texas has experienced. In Florida, each execution runs the state \$3,200,000-six times the expense of life imprisonment....Most of the extra costs of the death penalty are incurred prior to and at trial, not in post conviction proceedings. Trials are far more likely under a death penalty system since there is little incentive to plea bargain. They have two separate phases, unlike other trials, and typically are preceded by special motions and extra jury selection questioning-steps that if not taken before trial most likely will result in the eventual reversal of the conviction. Much more investigation is usually done in capital cases, particularly by the prosecution....There is roughly a 70% chance that a defendant sentenced to death eventually will succeed in getting the outcome set aside. The fault for this situation . . . lies squarely with the states. It is they who have created the endless appeals by attempting to avoid the ineluctable monetary costs of death penalty systems and to run them on the cheap by refusing to provide adequate funding for defense counsel." Law Professor Eric M. Freedman, Hofstra University of Law, 1997; in *ibid*, pp. 135-136.

"The mandatory review of death sentences by state supreme courts added a step unknown in non-death cases...at least \$70,000 per case. Further state and federal appeals cost at least \$275,000 more." David Von Drehle, 'Among the Lowest of the Dead' (1995) p. 358.

"Given the high cost of imprisonment, it is possible to imagine a hypothetical case where an execution might be less expensive than life imprisonment. For example, if a healthy 26-year old was sentenced to prison and died of natural causes 60 years later, it might be more expensive than if he had been sentenced to death and refused to appeal his sentence. But such hypothetical cases miss the point: cost estimates must include the cost of financing our system

of capital punishment. It is not the cost of a particular case that is relevant, it is the full cost of sustaining an elaborate death penalty system that consumes substantial time and resources. . . . Between 1977 and 1996, California spent more than one billion on its death penalty but managed to execute only five men In New York, the Department of Correctional Services calculated that reinstatement of the death penalty would cost the state \$118 million each year. Even the per-execution cost is enormous. In Florida, the average cost is \$3.2 million. In Wisconsin, the Legislative Fiscal Bureau estimated that reinstating the death penalty would cost the state between \$1.6 and \$3.2 million per execution....Even in Texas, each capital case costs taxpayers an average of \$2.3 million, nearly three times the cost of imprisonment in a maximum security cell for forty years."

Dr. Mark Costanzo, chair of Department of Social Psychology, Clarmont College, in 'Just Revenge: Costs and Consequences of the Death Penalty' (1997) pp. 60-61.

"Our own estimate is that death cases, on average, cost taxpayers about a million dollars more than their non-capital counterparts....Estimating the judicial resources devoted to a capital case in the Federal courts is difficult, but a fair guess would be ten times those in other cases....Even though we devote vast resources to the task, we come nowhere near executing the number of people we put on death row, and probably never will. We sentence about 250 inmates to death every year, but have never executed more than forty. Just to keep up with the number of new death row inmates, states would have to sextuple the pace of executions; to eliminate the backlog, there would have to be one execution a day for the next 26 years." U. S. Ninth Circuit Court of Appeals Judge Alex Kozinski and his law clerk Sean Gallagher; in 'The Death Penalty: Opposing Viewpoints' (1997) p. 141.

"I am currently on Connecticut's death row. Perhaps the people of this state have no objection to paying through the nose for this brand of justice-I readily admit to having no objections to running up the cost. But consider this: I am already behind bars and no longer a threat to society, but every dollar spent to assure my death (or anyone else's for that matter) means a dollar less toward the funding of more police, more prison cells... or any of the other programs aimed at reducing crime." Michael Ross, 2 11 95 in *ibid*, p. 138. Ross's 1987 death sentence was overturned on appeal and he is awaiting resentencing in Somers Prison, Connecticut.

"In May 1993, a federally funded study brought a new perspective to the debate. This model study...was conducted at Duke University's Terry Sanford Institute of Public Policy....Authors Philip Cook and Donna Slawson spent two years comparing the costs of adjudicating capital and non-capital cases in North Carolina and concluded that capital cases cost at least an extra \$2.16 million per execution compared to what taxpayers would have spent if defendants were tried without the death penalty and sentenced to life in prison."

Richard C. Dieter, Death Penalty Information Center report, fall, 1994; in 'The Death Penalty in America: Current Controversies' Hugo A. Bedau, ed. (1997) pp. 405-406.

"It is impossible to calculate the total amount of money wasted. Oklahoma {where events in 'The Innocent Man' took place} spends about \$20,000 a year to house an inmate Ron's {Ron Williamson and Dennis Fritz were wrongfully convicted of murder and sentenced to death. They served 11 years before being exonerated} tab was at least \$250,000. Same for Dennis These sums do not begin to contemplate the thousands of hours spent by appellate lawyers who worked so diligently to free the men, nor do they include the time wasted by the state's